WHEN IS DEATH INSTANTANEOUS?—The existence, side by side, in the same jurisdiction at the same time of the two statutes which have come to be generally known as the "DEATH ACT" (modelled after LORD CAMPBELL'S ACT), and the "SURVIVAL ACT," has led to many curious twists and turns of the law and has resulted in a decided conflict of authority as to their proper interpretation. It would almost seem as if the cases were in conflict upon every point upon which there could possibly be a difference of opinion. It is even difficult to reconcile some of the cases decided by the same court. For the different interpretations which have been given these statutes and the resulting conflict in authority see 15 HARV. L. REV. 854, 14 MICH. L. REV. 408, and for a full discussion of the Michigan cases an article on "CONSTRUCTION OF 'SURVIVAL ACT' AND 'DEATH ACT' IN MICHIGAN" in 9 MICH. L. REV. 205.

Upon one point the cases are fairly well agreed, that when death is "instantaneous" there can be but one recovery and that under the "DEATH ACT." Therefore, as pointed out in the note in 14 MICH. L. REV. 408, the question whether or not death is "instantaneous" is a vital one, and out of the decisions on that point there has sprung one of the most serious conflicts of the whole question, viz: when is death instantaneous? The inquiry in this note will concern only that particular phase of the general question.

In the recent case of *Great Northern Railway Co.* v. *Capital Trust Co., Adms.*, 37 Sup. Ct. 41, the Supreme Court of the United States was called upon to pass upon the point under discussion. An employee of the railway company was accidentally killed and suit was brought under the Federal EMPLOYER'S LIABILITY ACT for the benefit of his father and mother seeking to recover their pecuniary loss and also damages suffered by him prior to his death. Some evidence tended to show that after being run over by one or more cars, although wholly unconscious, the deceased continued to breathe for perhaps ten minutes. Testimony of other witnesses supported a claim that there was no appreciable continuation of life. The court held that death was instantaneous and that the circumstances afforded no basis for an estimation or award of damages in addition to the beneficiaries' pecuniary loss. In a former case, *St. Louis, I. M. & S. R. Co.* v. *Craft*, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160, the Supreme Court held that as the decendent had survived his injuries more than a half hour, the injuries being such as to cause him extreme pain and suffering if he remained conscious, the administrator might recover the beneficiary's pecuniary loss and also for the pain and suffering endured by the deceased. That is, death was not instantaneous, and a cause of action had vested in the injured employee which survived to his personal representative. In that case the rule was stated as follows: "Such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." The facts in *Great Northern Ry. Co.* v. *Capital Trust Co.*, supra, were deemed to bring it squarely within the rule as laid down in *St. Louis, etc., Ry. Co.* v. *Craft.* Therefore we may safely say that we have

a fairly, definite workable rule for guidance in future cases arising under the federal statute.

In Michigan the cases are confusing and fail to give a definite and certain test as to when death is instantaneous. See 9 MICH. L. REV. 205, 214. In *Olivier* v. *St. Ry. Co.,* 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607, 3 Ann. Cas. 53, the court said: "There is no occasion for saying that one dies instantly, because such survival is accompanied by a comatose condition, or unconsciousness, or insanity or idiocy," and cited *Keilow* v. *Railway Co.,* 68 Iowa 470, "where it was held that survival of the injury for a moment is sufficient to permit the cause of action to vest and survive." However, in the case of *West* v. *Detroit United Railway Co.,* 159 Mich. 269, 123 N. W. 1101, where decedent was struck by a street car, carried under the car and crushed, and was heard to groan for about fifteen minutes after the accident, though he was dead when taken from beneath the car, the court held that death was instantaneous and laid down the following rule: "Where there is a continuing injury resulting in death within a few moments, it is 'instantaneous'." Following this came the case of *Ely* v. *D. U. R.,* 162 Mich. 287, where the deceased was struck on the head by a trolley pole and lived about ten minutes, though never recovering consciousness, and it was held that the action was properly brought under the "SURVIVAL ACT." A still later Michigan case is *Lobenstein* v. *Whitehead & Kales Iron Co.,* 179 Mich. 279, 146 N. W. 293. In that case the deceased fell down a flue in a building under construction, and never recovered consciousness after he struck, although there were some signs of life about the body fifteen minutes after the fall, and it was held that death was instantaneous. For the latest Michigan case on the question see *Beach* v. *St. Joseph,* 158 N. W. 1045. This brief review of the Michigan cases alone serves to illustrate the confusion in the authorities and the inherent difficulties of the problem.

The results in other jurisdictions are equally as unsatisfactory. In *Moyer* v. *Oshkosh,* 151 Wis. 586, 139 N. W. 378, the decedent while riding a bicycle fell through an open draw in a bridge and was drowned. Death was held to be instantaneous, the court at the same time saying that the proper test is: "Was there a substantial period of conscious suffering between the injury and the death?" But evidently the court determined that there is no conscious suffering in death by drowning. It would almost seem as if our common knowledge would show this to be untrue, for it would be rare indeed where the first contact with the water would result in instant death or unconsciousness. On the contrary, would it not be more in accord with the circumstances generally accompanying such tragedies to say that while the deceased was struggling in the water and drowning there was a substantial period of conscious suffering? But see *The Corsair,* 145 U. S. 335; *Cheatham* v. *Red River Line,* 56 Fed. 248. In *Klann* v. *Minn,* 161 Wis. 517, 154 N. W. 996, in applying the rule the same court came to the conclusion that there was a substantial period of conscious suffering where the decedent was caught and burned in a building in which he was working. In other words, the court has decided that while the first flame which reached the deceased would not cause instant death or unconsciousness, nevertheless such would be the re-

sult from the first contact of the water in case of death by drowning. See also *Perkins* v. *Oxford Paper Co.,* 104 Me. 109, 71 Atl. 476, where the same rule is applied.

In Massachusetts we find still another variation of the rule. There the accruing right of action to the person injured and which will survive to his personal representative does not depend upon intelligence, consciousness, or mental capacity of any kind upon the part of the person injured. *Hollenbeck* v. *Berkshire R. Co.,* 9 Cush. (Mass.) 478. In the earlier case of *Kearney* v. *Boston & W. R. Co.,* 9 Cush. 108, it had been held by Chief Justice SHAW that where "there was only a momentary, spasmodic struggle" death was instantaneous. See also *Norton* v. *Sewall,* 106 Mass. 143, 8 Am. Rep. 298; *Mears* v. *Boston & M. R. Co.,* 163 Mass. 150, 39 N. E. 997. In a later Massachusetts case (*Martin* v. *Boston & M. R. Co.,* 175 Mass. 502, 56 N. E. 719) where a brakeman in descending from a train caught his foot, fell, and was dragged over two hundred feet before he was finally killed, the court held that there was no conscious suffering and so death was instantaneous. In *St. Louis, etc. Ry. Co.* v. *Stamps,* 84 Ark. 241, 104 S. W. 114, the Supreme Court of Arkansas on facts which indicated much more clearly that death had been instant reached an exactly opposite conclusion. The Massachusetts rule was applied in the principal case under discussion, *Great Northern Ry. Co.* v. *Capital Trust Co.,* supra, when it was before the Supreme Court of Minnesota (reported in 127 Minn. 144, 149 N. W. 14), and a different conclusion reached from that by the Supreme Court of the United States, viz: that death had been instantaneous.

Perhaps the rule announced by the Supreme Court will do much to clarify a problem which has been so troublesome. It will at least furnish a more definite test for solving these perplexing situations than any of the rules hitherto announced. M. C. M.